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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 603.

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,

STATE OF IOWA,
Intervenor.

INTERVENOR'S RESISTANCE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

JOHN M. RANKIN, Attorney General of Iowa,
State House,
Des Moines, Iowa,
NEILL GARRETT, Special Assistant Attorney General of Iowa,
1204 Equitable Building,
Des Moines, Iowa,
HORACE L. LOHNES, Special Counsel for State of Iowa,
1111 Munsey Building,
Washington, D. C.,
Attorneys for State of Iowa, Intervenor.

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STATE OF IOWA,
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INTERVENOR'S RESISTANCE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The State of Iowa, the Intervenor herein, respectfully prays and requests the Court to deny and to dismiss the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered on August 13, 1915, which affirmed the order of the Federal Power Commission denying the application of the petitioner for a permit to construct a hydro-electric project in and upon the Cedar River in the State of Iowa.

The State of Iowa as a sovereign state, through its Attorney General, intervened in these proceedings before the Federal Power Commission and in the United States Court of Appeals for the District of Columbia. It was necessary for the State of Iowa to protect itself and its statutes in this proceeding because the attorneys for the Federal Power Commission, Respondent, took the position and argued in the lower Court that the Iowa statutes made applicable by reference in Section 9(b) of the Federal Power Act, are invalid although that question had never before been raised or decided in any State or Federal Court.

The opinion of the United States Court of Appeals for the District of Columbia is reported in 151 F. (2d) 20. It is set out also in the Record commencing with page 54. The Order of the Federal Power Commission dismissing Petitioner's application for a license is set out at page 18 of the Record and the supporting opinion of the Power Commission is set out commencing on page 14 of the Record.

JURISDICTION.

The petitioner invokes the jurisdiction of this Court under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and under Section 313(b) of the Federal Power Act.

FEDERAL STATUTES INVOLVED.

The principal statute involved is Section 9(b) of the Federal Power Act. The Federal Power Act is the Act of June 10, 1920, (C. 285, 41 Stat. 1063, amended August 26, 1935; C. 687, 49 Stat. 838, 16 U.S.C. Sec. 791(a)).

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QUESTIONS INVOLVED.

The Petitioner has set out on pages 2 to 5 of the Petition, the questions which it is presenting to this Court. These may be grouped for convenience as follows:

(1) Whether compliance with Section 9(b) of the Federal Power Act is required as a prerequisite to the granting of a license by the Federal Power Commission;

(2) Whether there are applicable laws of the State of Iowa "with respect to bed and banks and to the appropriation, diversion and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power" or any other business necessary to effect the purposes of a license under the Federal Power Act;

(3) Whether the United States Court of Appeals erred in finding that there are applicable laws of the State of Iowa, the compliance with the requirements of which is a prerequisite under the provisions of Section 9(b) of the Federal Power Act to the granting of a license to the Petitioner;

(4) Whether the Federal Government has preempted the entire field in the enactment of the Federal Power Act to the exclusion of provisions of the State law as contained in Chapter 363 of the Code of Iowa.

STATEMENT.

The First Iowa Hydro-Electric Cooperative, the Petitioner herein, is a private Corporation for profit organized under the provisions of Chapter 390.1 of the Code of Iowa, 1939.

The Petitioner is seeking a review of the findings and judgment of the United States Court of Appeals for the District of Columbia, wherein that Court affirms the order

of the Federal Power Act which denied the application of the Petitioner for a permit to build a dam and hydro-electric power project on the Cedar River within the State of Iowa.

The State of Iowa, the Intervenor herein, respectfully submits to the Court that the Petitioner is not entitled to a writ of certiorari herein under the record and the status of this entire matter. The Intervenor respectfully submits to this Court that the petition should be denied and dismissed for all of the reasons hereinafter stated.

The Petitioner applied to the Federal Power Commission for a permit to build and construct a hydro-electric project and a dam in the Cedar River in such a manner as to virtually divert the river from its river-bed through a canal, which canal would empty into the Mississippi River and in which canal the power unit would be constructed. By this diversion of the water of the Cedar River, twenty-nine miles of the Cedar River from the point of the dam to its juncture with the Iowa River would become practically a dry run.

The only purpose is to construct a power project to sell current commercially. It is undisputed that by the nature of the construction there could be no navigation whatsoever from the Cedar River above the dam through this diversion canal, and obviously there could be no navigation in the dry-bed of the Cedar River in the twenty-nine mile stretch below the dam. The evidence shows beyond dispute that the Cedar River has been utilized by cities and towns located along its course, as a means of carrying away the sewerage from these various cities and towns and that the dam and the diversion canal will greatly interfere therewith and will undoubtedly create a health hazard and nuisance. The record shows without dispute that no provision has been made in the plan to preserve the fish in the river or to create an adequate fish way so that fish may proceed from the Mississippi River

up into the Cedar River. The project would destroy the recreational and fishing facilities afforded to the public in the Cedar River as now constituted.

Further, it is undenied and it is affirmatively shown in the record that the proposed project will overflow portions of paved primary highways of the State of Iowa, namely United States Highways No. 6, No. 38 and No. 61, and Iowa Primary Highway No. 22, such as to require rerouting and new construction, at great cost. The foregoing statement is sufficient to inform the Court as to the public interest of the State of Iowa in the proposed project.

Section 9(b) of the Federal Power Act (16 U.S.C.A. 802(b)) is the statute which is primarily involved in this proceeding. It provides among other things as follows:

> "Each applicant for a license under this Chapter shall submit to the Commission—
>
> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this Chapter."

The Petitioner ignored the provisions of said Section 9(b) and admitted both before the Power Commission and the United States Court of Appeals that the Petitioner had not complied with the requirements of the laws of the State of Iowa "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power". The Petitioner takes the position that although the State of Iowa has provisions of law applicable to the development and

regulation of water power in its streams as contained in Chapter 363 of the Code of Iowa, 1939, that said provisions of the Iowa law are invalid in that the Federal Government by the enactment of the Federal Power Act has completely and fully taken over the entire field. This in substance is the main question raised by petitioner.

The United States Court of Appeals for the District of Columbia filed a very carefully written opinion in connection with its judgment affirming the Order of the Federal Power Commission dismissing Petitioner's application. This opinion very carefully and fully reviews every legal aspect of the case, reviews the prior decisions of this Court and other Courts upon the questions involved, cites the authorities, and draws correct conclusions therefrom. It would be presumptuous for the writer of this Resistance to attempt to improve upon the review of applicable legal propositions and citations of authority therein contained in the opinion of the Court of Appeals. The ground is most thoroughly and painstakingly covered, and we submit that the inevitable conclusions expressed therein cannot be successfully refuted or challenged.

However, we shall direct attention to a specific reply to the affirmative statements contained in the petition for a writ.

REPLY TO PETITIONER'S REASONS FOR GRANTING A WRIT.

Petitioner states that this case is one of vital public significance. The case as it now stands with the decision against Petitioner is not one of vital public significance. However, on the other hand, if the Court should hold that Section 9(b) of the Federal Power Act does not mean what it says and does not require the applicant to submit satisfactory evidence to the Commission that it has complied

with the applicable laws of the State of Iowa, then that decision would be of vital public significance. The Petitioner comes to this Court admitting plainly that it has not even applied to any agency of the State of Iowa as required by the laws of the State of Iowa, for a permit to build or construct the project and dam. The Petitioner ignores the general rule that administrative remedies must be exhausted before judicial review can be availed of. The Petitioner went to the Power Commission and when confronted with Section 9(b) of the Power Act, said to the Commission that the provisions of Chapter 363 of the Iowa Code relative to such matters are invalid and inapplicable, and asked the Commission to so find. The Commission rightly responded that it had no right to determine the validity of the State statutes and had no other alternative than to refuse a permit because of the failure of the Petitioner to comply with Section 9(b) of the Act. See *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144; 88 L. ed. 379.

The Petitioner then on appeal to the United States Court of Appeals took the same position and argued that the Iowa statutes are inapplicable and void and that the Petitioner had a right to so assume, and asked the Court to so hold. Because of this situation and of this position taken by the Petitioner, the Intervenor submits that the Petitioner has disqualified itself from applying for or being entitled to a writ of certiorari in this case. It will be kept in mind that the Petitioner ignores the fact that it is a private party seeking to secure a permit from the Federal Government to obstruct a navigable river under a code of Federal laws primarily designed to protect navigation under the commerce clause of the Constitution. The Petitioner presumes to assume that it is entitled to the same rights as the sovereign Government of the United States were that sovereign seeking to build the dam and the obstruction in the Cedar River for governmental purposes. Obviously the Federal Power Act and other

kindred laws of the United States are definitive in nature and restrict the things that an applicant or permittee may or may not do which would tend to obstruct or to interfere with navigation.

Therefore, the Intervenor submits that under the record here, the Petitioner is not entitled to, nor is it eligible to apply for a writ of certiorari, and that the petition therefor should be denied and dismissed.

I.

The Petitioner has set out in the Appendix to its Brief, Chapter 363 of the Code of Iowa, 1939, beginning on page 26 of the Brief. We invite the Court's examination thereof, and call attention to the following specific provisions:

"7767. Prohibition—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation or municipality constructing, maintaining, or operating the same. (R60, Sec. 1264; C73, Sec. 1188; C97, Sec. 1921; C24, 27, 31, 35, Sec. 7767.)

7771. When Permit Granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. (R60, Sec. 1269; C73, Secs. 1193, 1198; C97, Sec. 1930; C24, 27, 31, 35, Sec. 7771.)

7796. State Lands. Whenever the erection of any such dam will affect highways or state-owned lands, the

applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. (C'24, 27, 31, 35, Sec. 7796.)"

Section 7768 states the form and contents of the application for a State permit. Section 7769 provides for notice of hearing, and Section 7760 provides for a hearing before the Executive Council of the State of Iowa. It will be observed that Section 7767 quoted above provides that no dam shall be constructed in any navigable or meandered stream for any purpose, and that no water shall be taken from streams for industrial purposes "*unless a permit has been granted by the Executive Council*" therefor.

It will be noted further that Section 7771 quoted above provides that if it shall appear to the Executive Council that the construction, operation or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted, or rendered deleterious to fish life, it shall grant a permit.

Obviously the State of Iowa does have laws such as are referred to in Section 9(b) of the Federal Power Act, and that under the provisions of said Section 9(b) the applicant herein for a license is required to submit to the Commission satisfactory evidence that the applicant has complied with the requirements of the laws of the State of Iowa with respect to bed and banks and to the appropriation, diversion and use of water. It was clearly the intention of Congress in the enactment of this provision that no private person should have the right to interfere with the enjoyment by the State of any of the waters of the State, without first complying with the laws of the State relative thereto.

If Petitioner's contention be correct, the Petitioner could by prevailing upon the Federal Power Commission to grant to it a permit, destroy valuable State property by flooding it and the State would be helpless. The record in this case shows that primary highways of the State will be flooded by this very proposal and those highways will have to be rerouted and rebuilt at considerable expense to the State of Iowa. We submit that it is obvious that Congress did not intend to permit any such violation of the rights of a sovereign State, and that by putting into the Federal Power Act the provisions of Section 9(b), Congress intended to require as a prerequisite to the granting of a permit by the Commission that the applicant must present satisfactory evidence of its compliance with the requirements of the applicable laws of the State.

Petitioner on page 9 of its petition, argues in this Court for the first time, that Section 23(b) of the Federal Power Act delineates the spheres within which State and Federal authorities may rightfully operate in the regulation of proposed power projects on flowing streams within the borders of a State. Section 23(b) (Sec. 817, 16 U.S.C.) refers to the obstructing of non-navigable streams which may or may not affect navigation in a navigable stream. There are many situations in the cases where an obstruction in a non-navigable stream has been held to affect navigability in a navigable stream. Under such circumstances this Section requires an applicant to secure a permit from the Federal Power Commission. However, the Section also provides that if the Commission finds that navigation is not affected and that no public lands or reservations are affected, the Commission shall grant permission to build the project upon compliance with State laws. This section merely carries out the general purpose of the Act that navigation must be protected, and that the Federal Government will not authorize a project

to be built by private individuals, unless the State consents thereto. There is nothing in Section 23(b) which affords any support to Petitioner's argument.

II.

The Petitioner states commencing on page 10 of its brief, that Chapter 363 of the Code of Iowa is a comprehensive enactment of general application concerning the development and regulation of water power and that the Chapter must be construed as a whole. It is true that the laws of Iowa relative to obstructions in streams, relative to mill races and to dams and to water power improvements, are all contained in Chapter 363 of the Code of Iowa. There are several different subjects covered in the Chapter. The provisions with which we are directly concerned in this proceeding are in Sections 7767, 7771 and 7796. Much of the rest of the Chapter is adjective law and is procedural. The Court of Appeals in its opinion refers to Chapter 363 of the Code of Iowa as such, time and time again, and at times points out individual sections and particularly Sections 7771, 7772 and 7796 for specific comment. By so doing the Court of Appeals has not ignored the other applicable provisions of the Chapter.

As stated, the Petitioner has not applied for a permit to build this project to the Executive Council of the State of Iowa nor to the Highway Commission of Iowa which has charge of highways, nor to the Board of Conservation which has charge of recreational and park facilities. The Petitioner has ignored the State. The Petitioner does not know and cannot know what view the Executive Council of the State might take of the proposed project until Petitioner has at least afforded the Executive Council an opportunity to pass upon an application for a permit. Neither does the Petitioner know whether the State Highway Commission would grant

a permit to Petitioner to build the project until it has afforded the Highway Commission an opportunity to pass upon an application. The same thing is true of the State Board of Conservation which under Section 7796 of the Code of Iowa, has jurisdiction over parks, river-beds, fishing and recreation. The State authorities may or may not grant the permit. The Petitioner is not entitled to raise these questions in the United States Court of Appeals nor in this, the Supreme Court, on this record. See *Highland Farms Dairy, Inc.*, v. *Agnew*, 300 U.S. 608, 616-617; *Red River Broadcasting Co.* v. *Fed. Communications Comm.*, 69 App. D. C. 1, 3, 98 F. (2d) 282, 284.

Counsel for Petitioner directly challenge the constitutionality of the Iowa statutes in the Court of Appeals and in this Court, and we submit that under the circumstances, Petitioner is not entitled to make such an attack. In the recent case of *Spector Motor Service, Inc., Petitioner* v. *McLaughlin, Tax Commissioner, Defendant*, decided by this Court December 4, 1944, and reported in 89 Law Edition at page 105, this Court discussed the question of constitutional adjudication and when the question could be raised in the Federal Courts. At page 108 the following appears:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law."

So questions of constitutionality of the laws of Iowa will not be determined by the Federal Courts until definite determinations have been made by the State Courts.

The Petitioner challenges the validity and the constitutionality of the Iowa statutes by asserting that it was the intention of Congress by the enactment of the Federal Power Act, to take over the entire field insofar as control over obstructions in navigable waters are concerned. We submit that the language of the Act does not bear such construction.

The Petitioner contends that there is a conflict between the provisions of the Federal Power Act and the statutes of the State of Iowa referred to and that the State statutes must give way to the superior power of the Federal Government. At the outset we submit as the Court of Appeals has found, that there is no conflict between the Federal and the State statutes.

We submit that the Federal Power Act anticipates a dual system of control. Congress by Section 9(b) of the Federal Power Act expressed the major intention that the States and the National Government should participate jointly in the development and regulation of water power projects. The maintenance of running streams, the preservation of wild life, the rights of riparian owners, drainage, sewerage, and industrial waste disposal and many other questions of public health and public policy are involved. It is the established policy of this Court that an overriding Federal power will not be exercised except when Congress manifests a clear intent so to do. The rule being followed by this Court was stated recently in *Connecticut Light & Power Company, Petitioner*, v. *Federal Power Commission*, decided March 26, 1945, and reported in 89 L. ed. 691 at 700. This Court there said:

> "We have said, and it is applicable to this case, that 'Where a Federal agency is authorized to invoke an overriding Federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of Federal authority to act should appear affirmatively and not rest on inference

> alone'. *Yonkers* v. *United States*, 320 U.S. 685, 692, 88 L. ed. 400, 404, 64 S. Ct. 327; *Florida* v. *United States*, 282 U.S. 194, 211, 212, 75 L. ed. 291, 301, 302, 51 S. Ct. 119; cf. *Palmer* v. *Massachusetts*, 308 U.S. 79, 84, 84 L. ed. 93, 97, 60 S. Ct. 34, 41 Am. Bankr. Rep. (N.S.) 131; *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 351, 85 L. ed. 881, 883, 61 S. Ct. 580. Nothing except explicit findings excluding the grounds of state control gives assurance that the bounds of Federal jurisdiction have been accurately understood and fully respected, and that state power has been considerately and deliberately overlapped."

It is therefore submitted that it is impossible to find any language in the Federal Power Act which indicates an intent on the part of Congress to override the rights of the State in such matters but on the contrary Congress by the inclusion of Section 9(b) of the Act clearly recognized State rights in these matters.

As stated by the Court of Appeals in its opinion, the rule of statutory construction applicable is that congressional intention to displace local laws in the exercise of the commerce power is not to be infegred, but must be clearly indicated.

This Court in *U.S.* v. *West Virginia*, 295 U.S. 463 at 472, 79 L. ed. 1546-1552, interpreted the provisions of Section 9(b) of the Federal Power Act. Mr. Justice Stone, speaking in that case, said:

> "The bill seeks an injunction against the corporate defendants, restraining only the construction of the dam without a license from the Federal Power Commission. But Section 9(b) of the Federal Water Power Act requires that every applicant for a license shall present 'satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of

> developing, transmitting, and distributing power * * *. The mere grant of the state license, which the Federal Water Power Act makes prerequisite to the application for the Federal license, cannot be said to involve any infringement of the federal authority. It does not appear that the State has done more."

Historically there has always been a sharing of responsibility and power over waters within the borders of a State. In *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 434; 85 L. ed. 243; 267, the authority of the States is recognized. It is there said:

> "The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers'. It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters."

Again, in *Illinois Central Railroad* v. *State Public Utility Commission*, 245 U.S. 493 at 510, 62 L. ed. 425, 438, this Court said the following:

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested."

Again in the case of *Maurer* v. *Hamilton*, 309 U.S. 589, 611; 84 L. ed. 969, 980, this Court stated a rule of statutory construction which is applicable in the case at bar as follows:

"As a matter of statutory construction congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is especially the case when public safety and health are concerned."

Attention is also called to *Kelly* v. *State of Washington*, 302 U.S. 1, 9; 82 L. ed. 3, 10, where it is specifically stated that the principle is thoroughly established that the exercise by a State of its police power which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled or cannot consistently stand together.

In practically every case where there has been a conflict between the power of the State and the power of the Federal Government, under the commerce clause, the Federal Government has interceded only to prevent an obstruction or interference with the navigation on a stream or an interference with commerce between the States by the creation of obstructions in or diversions of navigable waters. The exercise of the power of the Federal Government in such instances has been against interferences with navigation or the free flow of commerce, and not an affirmative assertion of the right on the part of the Federal Government to authorize such obstructions.

Congress, in the Rivers and Harbors Act of 1899 relating to navigation and navigable waters, long before the enactment of the Federal Power Act, took the same precautions and recognized the rights of the States in the same manner, as it did in the Federal Power Act and in Section 9(b) of the Act here in question.

For example, note the provisions of Section 9 of the Act of March 3, 1899 (30 Stat. 1151) U.S. Title 33, Section 401. It is there provided in so far as applicable:

"It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: Provided, That such structures may be built under authority of the Legislature of a State across rivers and other waterways, the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. * * *".

In the *Appalachian Electric Power* case, *supra*; after describing the inherent power of the Federal Government over the water power and flowing streams, this Court said (311 U.S. 377, 434; 85 L. ed. 243, 267):

"Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. This power is exercised through Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C.A. Section 401, prohibiting construction without congressional consent and through Section 4(e) of the present Power Act, 16 U.S.C.A. Section 797(e)."

On page 11 of its brief, the Petitioner states that joint State and Federal control means divided authority and that it is unreasonable to assume that Congress intended by Section 9(b) of the Act to require compliance with State laws by securing a State permit. Petitioner contends that if a State permit cannot be obtained then the Federal Power Act is thwarted and in effect vetoed by the State. That statement is an inaccuracy. The Federal Power Act is not vetoed. The application of a private party applying for a right to

obstruct a stream located within a State might be denied. The statement of Petitioner that a State might veto the Federal authority would be applicable only where a State attempts to construct an obstruction in a navigable water when the Federal Power Commission had refused to grant a permit under the Federal Power Act. That is not the case here. The law says that the Federal Power Commission may grant the permit if there is no objection thereto but that the applicant cannot have a permit until he has satisfied the Commission that he has also complied with State laws which may be applicable. There are many instances where there are dual controls. Attention is called to the recent case of *United States* v. *Southeastern Underwriters Assn.*, 322 U.S. 533, 548; 88 L. ed. 1440, 1451, where this Court stated the following:

> "It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated."

So it is submitted that simply because an applicant for a permit is required to satisfy both the State and Federal authority, that does not mean that a State can veto the Federal Power Act. As heretofore stated, the Federal Power Act is restrictive in nature and designed primarily to protect navigation and Interstate Commerce. It is not a statute designed for the purpose of letting the bars down and per-

mitting the erection and construction of any and all sorts of obstructions in navigable waters. Obviously a permit issued under the State law could not authorize and permit something which the permit issued by the Federal Power Commission under the Federal Power Act prohibits. Therefore there is no repugnancy.

III.

Counsel for the Petitioner argues as though a permitholder under the Federal Power Act authorized to construct a private project assumes the prerogatives of the Federal Government under the commerce clause. That cannot be true. Such a permittee secures only a right to build the project if the permit is granted in accordance with the restrictions and requirements prescribed by the law and the Commission. A permittee is not clothed with governmental authority simply because the Power Commission may give it a license to build its project. The Ninth Circuit Court in *United States* v. *Central Stockholders Corporation of Vallejo, et al.*, 52 Federal (2d) 322 at 332 stated:

> "The Supreme Court held in the *Ford* case, (*Ford & Son* v. *Little Falls Co.*, 280 U.S. 369, 50 S. Ct. 140, 74 L. ed. 483) in effect, that it was not the intention of Congress to vest any portion of its sovereign power in the permittee, and, assuming that the government might have exercised its control over navigable streams by and through a permittee under the Federal Water Power Act, that it was not the intention of the Government so to do."

The present case involves no more than the expressly limited powers of a Federal Agency to license a private corporation which seeks to operate under the restrictive provisions of the Power Act. Congress clearly intended that the Federal Power Commission should cooperate with the States.

Section 9(b) of the Federal Power Act expresses the major intention of Congress that the States and the National

Government shall participate jointly in the development and regulation of water power projects. As stated by the Court of Appeals in its opinion, this section preserves State laws "with respect to bed and banks (of streams) and with respect to the appropriation, diversion and use of water for power purposes".

Obviously this Section operates the same as does Section 27 of the Act preserving to the States the control, appropriation, or use or distribution of water used in irrigation or for municipal purposes. Petitioner is by innuendo attempting to read interpretations into the judgment and findings of the Power Commission and of the Court of Appeals which are not justified or borne out by the language of the law.

Petitioner is not impaled on the horns of a dilemma as it contends. All Petitioner is required to do is to satisfy the most rigid regulations of either the Federal Power Commission or the State, whichever may be the most strict. Petitioner assumes and states in argument that it is of the opinion that it could not secure a permit from the Executive Council of the State of Iowa. Such a statement has no place in this matter. Petitioner has ignored the State of Iowa and has not tried to secure a permit. It is not in good standing and is not entitled to assert the fact until it becomes the fact. The Executive Council may decide Petitioner's project is so beneficial to the State as to overbalance any of the objectionable features. That is the province of the Executive Council of the State of Iowa.

It is submitted that the presentations by the Petitioner on these matters are unsound and unworthy of consideration.

CONCLUSION.

The only real proposition before this Court is whether the Petitioner complied with the provisions of Section 9(b)

Federal Power Act, by furnishing satisfactory evidence that the applicant has complied with the requirements of the laws of the State of Iowa with respect to bed and banks and to the appropriation, diversion and use of water for power purposes. Petitioner is not attacking the constitutionality or validity of Section 9(b) of the Water Power Act. Petitioner, by indirection and innuendo is saying to this Court that Section 9(b) of the Water Power Act does not mean what its plain language states. The State of Iowa submits that this may be termed a back door attack upon the applicable laws of the State of Iowa and, therefore, cannot prevail.

It is submitted that Petitioner is not entitled to a review, nor to attack in this Court the statutes of Iowa because Petitioner admittedly has never made any effort to comply with either Section 9(b) of the Federal Power Act or with the applicable statutes of Iowa, and has never given the Executive Council of Iowa nor any other state agency an opportunity to pass upon the proposed project.

It is submitted that there is no repugnancy between the Federal Power Act and the Iowa statutes because Congress by reference in Section 9(b) of the Federal Power Act made the statutes of the State a part of the Federal Power Act and they cannot, therefore, be found to be invalid or to be repugnant to the Federal Power Act.

The State of Iowa, the Intervenor herein, respectfully submits to the Court that the Petitioner is not entitled to sue for a writ of certiorari in this Court, and that in any event the Petition herein should be denied and dismissed.

Respectfully submitted,

JOHN M. RANKIN, Attorney General of Iowa,
NEILL GARRETT, Special Assistant Attorney General of Iowa,
HORACE L. LOHNES, Special Counsel of State of Iowa,
Attorneys for State of Iowa, Intervenor.